Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies;	)	WT Docket No. 16-421
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	

REPLY COMMENTS OF THE FIBER BROADBAND ASSOCIATION ON THE MOBILITIE, LLC, PETITION FOR DECLARATORY RULING

The Fiber Broadband Association ("FBA" or "Association")[1] hereby submits its reply comments in response to the Mobilitie, LLC Petition for Declaratory Ruling ("Mobilitie Petition")[2] and the Federal Communications Commission's ("Commission's") corresponding Public Notice.[3] The FBA focuses its reply on a subset of the issues raised by parties' initial

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1 The FBA was formerly known as the Fiber to the Home Council Americas (the "FTTH Council"). The Association's mission is to accelerate deployment of all-fiber access networks by demonstrating how fiber-enabled applications and solutions create value for service providers and their customers, promote economic development, and enhance quality of life. The Association's members represent all areas of the broadband access industry, including telecommunications, computing, networking, system integration, engineering, and content-provider companies, as well as traditional service providers, utilities, and municipalities. As of today, the FBA has more than 250 entities as members. A complete list of FBA members can be found on the organization's website: https://www.fiberbroadband.org/.

2 *See* Petition for Declaratory Ruling, Mobilitie, LLC, WT Docket No. 16-421 (filed Nov. 15, 2016).

3 *See Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, Public Notice, DA 16-1427 (rel. Dec. 22, 2016) ("Public Notice").

comments regarding the interpretation of Section 253 of the Communications Act of 1934, as amended (the "Act").[4] Specifically, the FBA urges the Commission to reject the following interpretations of Section 253 proffered by some commenters: (1) the "fair and reasonable compensation" provision in Section 253(c) allows State and local governments to assess fees on providers for access to public rights-of-way ("PROW") based on alleged and speculative fair market value, rather than being directly related to actual costs of a government's supervisory functions in managing telecommunications providers' access to and use of the PROW, including costs of maintaining the portion of PROW used by providers; (2) the Commission lacks authority to preempt State and local PROW regulations pursuant to Section 253(c); (3) Section 253(d) requires case-by-case treatment of local regulations and precludes a declaratory ruling in this generic proceeding; and (4) Section 253 does not apply to State and local government actions taken in their capacity as property owners, rather than regulators. The FBA submits that each of these interpretations is contrary to the plain reading of, and undermines the central purposes of, Section 253 – reducing barriers to entry for telecommunications services. Instead, the Commission should adopt the interpretations of Section 253 set out in the FBA's (then FTTH Council's) original comments.

I. THE PHRASE "FAIR AND REASONABLE COMPENSATION" IN SECTION 253(c) DISEMPOWERS STATES AND LOCAL GOVERNMENTS FROM CHARGING PROVIDERS FAIR MARKET VALUE FOR ACCESS TO PROW

Several commenters argue that the phrase "fair and reasonable compensation . . . for use of public rights-of-way" in Section 253(c) gives State and local governments broad authority to levy fees and other charges to applicants for PROW access based on the fair market value of the

[4] *See* 47 U.S.C. § 253.

PROW, rather than tying compensation directly to the recovery of costs.[5] However, this overly-broad interpretation would contravene both the plain language and intended purpose of the statute. Under Section 253(c), State and local governments may "require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, **for use of public rights-of-way** on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[6] This language limits State and local governments to receiving compensation in connection with a provider's use of the PROW and, in turn, the costs imposed by that use.

Commenters that favor the "fair market value" interpretation of the compensation provision admit that the expansive interpretation they champion would allow State and local governments to seek compensation that goes beyond recovery tied to providers' use of the PROW. For instance, the Board of County Road Commissioners of the County of Oakland, Michigan asserts that providers should be subject to fees that would help to recoup the costs of land acquisition by State and local governments,[7] and the Virginia Joint Commenters contend that PROW fees "may be intended in part to recover some of the costs arising from local

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5 *See, e.g.*, Joint Comments of League of Arizona Cities and Towns, League of California Cities, California State Association of Counties, New Mexico Municipal League, League of Oregon Cities & SCAN NATOA, Inc., WC Docket No. 16-421, 25-28 (filed Mar. 8, 2017) ("Arizona Cities et al. Comments"); Comments of Virginia Joint Commenters, WC Docket No. 16-421, iv (filed Mar. 8, 2017) ("Virginia Joint Comments"); Comments of the City of Arlington, Texas, WC Docket No. 16-421, 9-10 (filed Mar. 7, 2017) ("Arlington Comments"); Comments of the City of Houston, Texas, WC Docket No. 16-421, 8 (filed Mar. 8, 2017) ("Houston Comments"); Comments of the City of New York, WC Docket No. 16-421, 8 (filed Mar. 8, 2017) ("NYC Comments"); Comments of the Board of County Road Commissioners of the County of Oakland, Michigan, WC Docket No. 16-421, 8-9 (filed Mar. 8, 2017) ("Oakland County Comments").

6 47 U.S.C. § 253(c) (emphasis added).

7 Oakland County Comments at 8.

government's management responsibilities, but they can also advance other policy goals," such as minimizing public inconvenience caused by blocking traffic.[8] State and local governments may have a variety of budget and policy concerns related to land management and the many uses of the PROW, by cars and trucks, utilities, pedestrians and cyclists, in addition to telecommunications providers, nevertheless, adoption of the "fair market value" interpretation of Section 253(c) in assessing fees on telecommunications providers that ends up recouping costs imposed by other users of public lands and rights-of-way or that advances other policy goals would be facially inconsistent with the statute and previous interpretations of it by the Commission.[9] There simply would be no standard to apply to determine what "fair and reasonable" compensation is under these interpretations as there is not a free market for use of PROW, because there is only one supplier in each geographic market – the government.[10] In

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8 Virginia Joint Comments at 56.

9 *See* Initial Comments of Lightower Fiber Networks, WC Docket No. 16-421, 28-29 (filed Mar. 8, 2017) (noting that "[t]he Commission has acknowledged that fees such as gross revenue franchise fees are not related to the costs associated with the provider's use of the ROW or based upon the construction of new facilities and that such fees are precisely the kind of barrier to competitive entry that congress intended section 253 to remove") (internal citations and quotations omitted); Comments of the Wireless Infrastructure Association, WC Docket No, 16-421, 68-69 (filed Mar. 8, 2017) (quoting an amicus curiae brief in which the Commission explained that "a fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry") (internal citations omitted).

10 One commenter averred that local governments would not be able to obtain excessive rents because different localities compete with each other for communications networks and services. *See* Comments of Smart Communities Siting Coalition, WT Docket No. 16-421, 39-40 (filed Mar. 8, 2017). This is nonsense, showing a lack of understanding of how the network business works, and no evidence is provided to cite this theorem. First, geographic markets differ in the business opportunity and overall costs of deployment. Second, providers serve their customers, who may be in one market and not another. Third, providers build networks where they have a sufficient mass of customers and will not undertake a deployment where that is not the case.

short, the broad interpretation these commenters urge would give the governments essentially free range to charge almost any compensation they desire and thereby undercut the overarching purpose of Section 253 of promoting entry and ongoing competition. Thus, as explained in the FBA's initial comments, the Commission should declare that "fair and reasonable compensation" requires that the fees imposed on providers by a State or local government must be directly related to the actual costs incurred by the State and local government in exercising supervisory functions when managing telecommunications providers' use of PROW, including maintenance costs related to that use.[11]

II. PREEMPTIVE AUTHORITY UNDER SECTION 253(c) EXTENDS TO THE COMMISSION AND IS NOT EXCLUSIVELY RESERVED FOR THE COURTS

Several commenters claim that the Commission lacks jurisdiction to preempt a State or local regulation based on a violation of Section 253(c). Rather, these parties assert that the structure and legislative history of Section 253 reserves jurisdiction over Section 253(c) issues to the courts.[12] However, there is nothing in the language in Section 253 to suggest that Section

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11 As the FBA noted in its original comments, this interpretation would send a clear message to State and local authorities that attempts to use the compensation clause of Section 253(c) to either slow the deployment of telecommunications services or as a means of generating revenue or extracting additional unrelated benefits, such as gifts of free fiber or service along certain routes will be subject to preemption by the Commission and should not be tolerated by the courts.

12 *See, e.g.*, Virginia Joint Comments at 42-45; NYC Comments at 8; Comments of the League of Minnesota Cities, WC Docket No. 16-421, 8 (filed Mar. 8, 2017); Comments of the National Association of Regulatory Utility Commissions, WC Docket No. 16-421, 12-13 (filed Mar. 8, 2017); Texas Municipal League (TML) Comments, WC Docket No. 16-421, 22-25 (filed Mar. 8, 2017); Comments on behalf of the following cities in Washington State: Bellevue, Bothell, Burien, Ellensburg, Gig Harbor, Kirkland, Mountlake Terrace, Mukilteo, Normandy Park, Puyallup, Redmond and Walla Walla, WC Docket No, 16-421, 9 (filed Mar. 8, 2017). In particular, commenters rely on floor statements from Senators leading up to the enactment of the Telecommunications Act of 1996. However, floor statements by members of Congress are not dispositive,

253(c) disputes must be presented in a federal court.[13] At most, the statute presents an ambiguity over the FCC's jurisdiction. In the face of such ambiguity, the Commission can determine its own jurisdiction to rule in a Section 253(c) preemption case.[14] Indeed, Chairman Pai recently reaffirmed his view that the Commission has preemptive authority under Section 253(c). When announcing his Digital Empowerment Agenda in September 2016, he commented that "where states or localities are imposing fees that are not 'fair and reasonable' for access to local rights of way, the FCC should preempt them."[15] Accordingly, the Commission should reject the assertion

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particularly when the view taken in the floor statements runs contrary to the purpose of the statute.

13 The Supreme Court has held that Section 201(b) gives the Commission the power to implement all of the provisions of Title II, including those provisions of the 1996 Act that concern matters historically under state (or local) jurisdiction, unless a provision specifies otherwise. *See AT&T v. Iowa Utilities Board*, 525 U.S. 366, 380 (1999); *see also id*. at 382, n. 9 (explaining that the existence of provisions mandating that the FCC exercise jurisdiction does not imply that the FCC lacks permissive jurisdiction to implement provisions that lack such mandatory language).

14 Four years ago, the Supreme Court upheld the Commission's latitude to determine its own jurisdiction when the language of the Communications Act is ambiguous on the issue. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1874-75 (2013) ("Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is 'jurisdictional.' If 'the agency's answer is based on a permissible construction of the statute,' that is the end of the matter.") (internal citations omitted). Moreover, in at least one case, the Commission established what is effectively a Section 253(c) preemption analysis, although in that instance it did not reach the issue of whether it had the authority to preempt the particular agreement before it. *State of Minnesota (Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way)*, CC Docket No. 98-1, Memorandum Opinion and Order, 14 FCC Rcd 21697, ¶¶ 59-63 (1999).

15 *See* Remarks of FCC Commissioner Ajit Pai at the Brandery, "A Digital Empowerment Agenda" (Sept. 13, 2016) ("Pai Digital Empowerment Remarks"). *See also* FCC Commissioner Michael O'Rielly, Statement Before the Senate Committee on Commerce, Science, and Transportation, "Oversight of the Federal Communications Commission," at 1-2 (Sept. 15, 2016) ("At some point, the Commission may need to exert authority

that preemption based on Section 253(c) violations can only be issued by a federal court and confirm that it, too has jurisdiction to issue such a ruling (enforceable by the courts).

III. THE COMMISSION SHOULD PROVIDE GUIDANCE FOR PREEMPTION DECISIONS UNDER SECTION 253(d)

The City of New York posits that, even if the Commission has authority to preempt on a case-by-case basis, "any attempt by the Commission to issue binding determinations pursuant to [Section 253] that would preempt local management of rights-of-way authority … would be beyond the scope of the Commission's statutory authority."[16] The City's rationale rests on the claim that the Commission's preemption authority under Section 253(d) "authorizes only case-by-case action, not action by general rule because it authorizes preemption only to the extent necessary to correct the applicable violation or inconsistency."[17] However, this proceeding is not intended to target or preempt any one particular State or local regulation that might be subject to preemption under Section 253. Rather, the FBA and others have simply asked the Commission to set forth clear "rules of the road" that will facilitate smooth rollouts of telecommunications infrastructure and services across the nation going forward.[18] Indeed, the Commission has long

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provided by Congress to preempt the activities of those delaying 5G deployment without justifiable reasons.").

16 NYC Comments at 6.

17 *Id*.

18 For example, the FBA suggested that the Commission should consider adopting a rebuttable presumption regarding "fair and reasonable compensation" – perhaps by initiating a statistical study of rates around the country and the methods by which the rates were adopted to establish the basis for such a presumption. Additionally, FBA proposed generally that the appropriate factors to consider when evaluating if fees and obligations are competitively neutral and nondiscriminatory include: (1) assessing whether fees and obligations differ among applicants in terms of the "value" of the fees and obligations; and (2) determining whether different types of providers are subject to disparate treatment by the State or local authority. If a State or local regulation fails to satisfy these factors, it should presumptively be subject to preemption by the

acknowledged the need for "guidelines for public rights-of-way policies that will ensure that best practices from state and local government are applied nationally."[19] Thus, the contention by the City of New York that the Commission would exceed its authority by issuing a declaratory ruling in this proceeding to be applied across many cases is misguided.[20]

IV. MANAGEMENT ACTIVITIES AND COMPENSATION REQUIREMENTS RELATED TO PROW ARE NECESSARILY "REGULATORY DECISIONS" THAT ARE SUBJECT TO SECTION 253

Some commenters argue that when making decisions in response to requests for access to PROW, State and local authorities are acting in their capacity as property owners, not regulators, and as such, they are not subject to oversight by the Commission or courts under Section 253.[21] However, the Commission has already concluded that Congress intended for Section 253(c) to effect broad oversight of non-federal government "management activities" when it enacted the statute, including the decisions of the type described in these comments.[22] It is difficult to

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Commission, unless the State or local authority can provide a reasonable explanation for the differences in fees.

19 *See* Federal Communications Commission, Connecting America: The National Broadband Plan, at ch. 6 (2010).

20 Indeed, "[t]he Commission is authorized to issue a declaratory ruling 'to terminate a controversy or remove uncertainty,' 5 U.S.C. § 554(e); *see also* 47 C.F.R. § 1.2, and there is no question that a declaratory ruling can be a form of adjudication." *Qwest Svcs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007). The court in this case further noted that "[m]ost norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication, and accordingly agencies have very broad discretion whether to proceed by way of adjudication or rulemaking." *Id*. (internal citations omitted).

21 *See* Arizona Cities et al. Comments at 2-3; Comments of the Florida Coalition of Local Governments in Response to FCC Public Notice DA 16-1427, WC Docket No. 16-421, 10-11 (filed Mar. 8, 2017); Comments of the Cities of San Antonio, Texas; Eugene Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee, WC Docket No. 16-421, 14-15 (filed Mar. 8, 2017).

22 *See Classic Telephone, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13103-04 (1996), quoting 141 Cong. Rec. S8172 (June 12, 1995) (statement of Sen.

imagine that scrutiny of decisions by State and local regulators regarding the physical alteration, occupation, and restoration of PROW would fall outside the scope of Section 253(c), simply because the regulator also happens to own the PROW in question. The nature of *public* rights-of-way, and the question of local government management in any guise of the use of those rights-of-way by telecommunication providers and compensation therefore, are subject to Section 253. In a word, PROW inherently implies public ownership. But if the fact of property ownership by local governments pulls certain PROW outside the purview of Section 253, then, in effect, all PROW must fall outside the statute. And that result clearly would be absurdly wrong and contrary to Congressional intent in passing Section 253.

CONCLUSION

For all of the above-stated reasons and those set forth the FBA's initial comments, the FBA respectfully requests that the Commission issue a declaratory ruling regarding the

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Feinstein) ("During the Senate floor debate on section 253(c), Senator Feinstein offered examples of the types of restrictions that Congress intended to permit under section 253(c), including State and local legal requirements that: 'regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts'; 'require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies'; 'require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation'; 'enforce local zoning regulations'; and 'require a company to indemnify the City against any claims of injury arising from the company's excavation.'"); *See also TCI Cablevision of Oakland Cnty., Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21442 (¶ 103) (1997) (finding that permissible activities under section 253(c) "include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.").

appropriate interpretation and implementation of Section 253 of the Communications Act in order to achieve the objective of reducing barriers to entry for telecommunications services.

Respectfully Submitted,

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